IN THE

Supreme Court of the United States

No. 118. October Term, 1943.

HOWARD KIKER,
Petitioner-Plaintiff,

v.

CITY OF PHILADELPHIA, BERNARD SAMUEL, Acting Mayor of Philadelphia, DAVID W. HARRIS, Receiver of Taxes and ERNEST LOWENGRUND, Acting City Solicitor,
Defendants-Respondents.

ANSWER AND BRIEF OF DEFENDANTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

ROBERT McCAY GREEN,
City Solicitor,
ABRAHAM L. SHAPIRO,
ABRAHAM WERNICK,
Assistant City Solicitors,
Attorneys for Defendants,
705 City Hall Annex,
Philadelphia, Pa.

Martin & Lyle, 302 Penfield Bldg., Phila., Pa.

INDEX

TABLE OF CASES

TABLE OF STATUTES

Of the United States of America:

Of the Commonwealth of Pennsylvania:

ORDINANCES

Of the City of Philadelphia:

IN THE

SUPREME COURT OF THE UNITED STATES

No. 118. October Term, 1943.

HOWARD KIKER,
Petitioner-Plaintiff,

v.

CITY OF PHILADELPHIA, BERNARD SAMUEL, Acting Mayor of Philadelphia, DAVID W. HARRIS, Receiver of Taxes and ERNEST LOWENGRUND, Acting City Solicitor,
Defendants-Respondents.

ANSWER AND BRIEF OF DEFENDANTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The answer of the defendants to the petition for writ of certiorari to the Supreme Court of Pennsylvania respectfully represents:

(a) The petitioner is requesting your Honorable Court to review the judgment of the Supreme Court of Pennsyl-

vania which held that the compensation received from a non-resident employed by the government in a federal area, known as "League Island Navy Yard" is subject to the non-discriminatory income tax imposed by the City of Philadelphia on December 13, 1939. This petitioner, although employed at the League Island Navy Yard for 16 years did not file his bill of complaint until December 16, 1942. From January 1, 1940 until December 16, 1942 considerable sums of money were collected by the City of Philadelphia under this Income Tax Ordinance from non-residents employed in federal areas. The petition in the present proceeding was not filed with your Honorable Court until June 25, 1943, whereas the opinion of the Supreme Court of Pennsylvania was filed March 29, 1943.

It may be of interest to observe that another federal employee working at the League Island Navy Yard also filed his petition with this Honorable Court for the allowance of a writ of certiorari on July 2, 1942, although the Superior Court of Pennsylvania rendered its decision on March 13, 1942, and the Supreme Court of Pennsylvania refused to allow an allocatur on April 10, 1942; (cert. den. by this Court.) (PHILADELPHIA v. SCHALLER, 87 L. Ed. 38, 63 Sup. Ct. 43).

I. STATEMENT OF QUESTIONS INVOLVED.

1. Was League Island within the territorial, geographical and political boundaries of the City of Philadelphia prior to the time that title thereto was ceded to the United States?

2. Is League Island within the exterior boundaries of Pennsylvania so as to fall within the definition of "Federal area" as appearing in Section 6 of Public Act 819 (4 U. S. C. A. sec. 18)?

3. Do the words "Federal area" as used in Public Act 819 embrace lands previously ceded to the United States where exclusive jurisdiction over such area was granted to the United States?

4. Must a state accept a retrocession or relinquishment of jurisdiction from the Federal Government before it becomes valid?

II. ARGUMENT.

1. Was League Island within the territorial, geographical and political boundaries of the City of Philadelphia prior to the time that title thereto was ceded to the United States?

In the majority opinion filed in the instant case the Supreme Court of Pennsylvania said (p. 292, 31 A. 2d):

> "League Island lies on the westerly bank of the Delaware River, just above the mouth of the Schuylkill, and originally was a part of the City of Philadelphia."

On page 295 of the same opinion the State Supreme Court cites several legal authorities to support the principle that the court may take judicial notice of this fact.

On page 13 of the appellee's brief filed with the State Supreme Court, the City of Philadelphia referred to the ordinance of City Council of April 9, 1864, page 151, wherein the City Solicitor is authorized to examine the title to the whole of League Island, which is described therein as "being in the first ward of the City of Philadelphia"; and it is further stated that the sum of $340,000 is appropriated for the purchase of League Island from the Pennsylvania Company and the Mayor is requested to tender League Island to the United States Government as a location for a navy yard or naval depot. On the same page of the City's brief reference was made to the Ordinance of Council of July 23, 1867, page 261, wherein it was stated that under an Act of Congress of February 18, 1867, the Secretary of the Navy was authorized to accept title to League Island from the City of Philadelphia.

On page 12 of the same brief reference is made to the

Act of February 10, 1863, P. L. 24, 74 P. S. §1, note under which Act title to League Island was ceded to the United States, which Act reads in part as follows:

> "That the consent of the Commonwealth of Pennsylvania is hereby granted to the United States of America, to purchase and acquire title to all that island in the Delaware River, at and above the mouth of the Schuylkill River, in the City and County of Philadelphia, called and known as 'League Island' * * *."

It will thus be observed that the Supreme Court of Pennsylvania was fully justified in taking judicial notice of the fact that League Island was originally a part of the City of Philadelphia.

2. Is League Island within the exterior boundaries of Pennsylvania so as to fall within the definition of "Federal area" as appearing in Section 6 of Public Act 819 (4 U. S. C. A. sec. 18)?

On October 9, 1940 Congress enacted Public Act 819, 54 Stat. 1059, 1060, 4 U. S. C. A. sections 13 to 18. Therein it was provided that no person shall be relieved from liability for the payment of any sales, use tax or income tax levied by any state, or by any duly constituted taxing authority having jurisdiction to levy such a tax by reason of his residing within the federal area or because the sale or use with respect to which such tax is levied occurred in whole or in part within a federal area or by reason of such person receiving income from transactions occurring or services performed in such area. *It was further provided that any such state or taxing authority shall have full jurisdiction and power to levy and collect such tax in any federal area within such state to the same*

extent and with the same effect as though such area was not a federal area.

Section 6 of this Act defines federal areas as follows:

> "The term 'Federal area' means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any state shall be deemed to be a Federal area located within such state."

The question therefore arises whether League Island is located "within the exterior boundaries of the State of Pennsylvania".

In the majority opinion filed by the Supreme Court of Pennsylvania in the present case the following was stated (p. 295 of 31 A. 2d):

> "The area in which plaintiff is employed or engaged is actually no longer an island, but is now physically a part of the main land of this commonwealth. The reservation is immediately adjacent to Philadelphia; is geographically within its limits * * *".

It was further stated in the majority opinion (p. 297):

> "Plaintiff argues that the phrase of the ordinance 'in Philadelphia' excluded League Island because it is not within Philadelphia. This contention is without merit, for obviously that phrase was intended to mean within the geographical limits of the city. As is clearly shown by the Act of February 2, 1854[6] (incorporating the City) and the statutes granting consent to its purchase and ceding jurisdiction over League Island, as well as the Federal Government's certificate of acceptance thereof, the reservation is within the City's territorial boundaries and the area comprising the island is not, by the phrase 'in Phila-

delphia' excluded from the rest of the City where the tax is clearly applicable".

In note "6" the following statement appears:

"That statute (Act of February 2, 1854) shows League Island to be in the first ward of the City of Philadelphia".

We therefore have a legal finding by the highest court of the State of Pennsylvania to the effect that League Island is located within the exterior boundaries of the State of Pennsylvania, and therefore comes within the definition of "federal area" as contained in section 6 of Public Act 819.

This subject matter is more fully discussed on the first four pages of the reply brief for appellees filed with the State Supreme Court.

3. Do the words "Federal area" as used in Public Act 819 embrace lands previously ceded to the United States where exclusive jurisdiction over such area was granted to the United States?

It would seem obvious that if League Island Navy Yard falls within the definition of "federal area" as contained in section 6 of Public Act 819, the benefits conferred by Public Act 819 should enable the City of Philadelphia to include within the provisions of the ordinance of December 13, 1939 the compensation earned by non-residents at the navy yard.

The plaintiff, however, argues that Public Act 819 was only aimed to clarify and declare the law as it existed prior to October 9, 1940; and by reason thereof it can only apply to a situation where at the time of cession a state reserved unto itself concurrent taxing jurisdiction. Consequently, the plaintiff argues that Public Act 819 does

not apply to Pennsylvania or Philadelphia because at the time League Island was ceded to the Government, the State did not reserve concurrent taxing jurisdiction, but granted to the Government exclusive jurisdiction.

It is respectfully urged that this reasoning cannot stand the test of analysis. It is not disputed by the plaintiff that when a state ceding any portion of its territory to the Federal Government reserves concurrent taxing jurisdiction, that it has the power to impose *all* types of taxes within the area so ceded. Hence, if Public Act 819 aimed at declaring the law as it existed then it should have granted permission to states reserving taxing jurisdiction at the time of ceding any of its territory to the Government to impose *all* types of taxes. For illustration, in such a situation a state would not only have the right to impose sales, use, or income taxes, but also personal property taxes, documentary stamp taxes, amusement taxes, real estate taxes, taxes on open air parking lots and various other varieties of taxes which the human mind can suggest. *But in Public Act 819 Congress limited the right of taxation to three types of taxes, namely, sales, use or income taxes.*

It will thus be seen that instead of Congress declaring the law as it existed when applied to states reserving taxing jurisdiction, not only confused such law but actually cut down such taxing authority and deprived the state of exercising its taxing powers as to other forms of taxation.

It is extremely doubtful whether such an act would be constitutional in taking away from a state, reserving unto itself its taxing power, any part of such power. But, apart from that consideration, it seems absurd to contend that Congress in aiming at declaring the law as it existed would not only create confusion but attempt to restrict and limit any taxing powers reserved to the state. And yet that is the conclusion to which one is irresistibly drawn, if the plaintiff's position were adopted.

It therefore follows that the only logical and sane

interpretation of Public Act 819 is, that it must necessarily apply to a situation where on October 9, 1940 a state did not possess the power to impose any type of taxes in federal areas; such as Pennsylvania, where exclusive jurisdiction was granted to the Federal Government at the time the land was ceded.

This view is fortified by examining section 4 of Public Act 819, which reads:

> "The provisions of this act shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area *over which it would otherwise have exclusive jurisdiction* or to limit the jurisdiction of the United States over any Federal area." (Italics supplied.)

There would be no reason for section 4 to appear in Public Act 819 if the act is intended only to apply to a case where concurrent jurisdiction was reserved at the time of cession; because there the Government never had exclusive jurisdiction and it would be folly for Congress to say that the provisions of Public Act 819 shall not be deemed to deprive the United States of exclusive jurisdiction over any federal area over which it would otherwise have exclusive jurisdiction.

Such language is entirely superfluous and meaningless if the plaintiff's position is correct.

The fact that Congress took the precaution by section 4 to state that the granting by it to a state or taxing authority the right to impose sales, use or income taxes should not deprive the United States of exclusive jurisdiction where it otherwise would have had exclusive jurisdiction indicates beyond a doubt that Public Act 819 was only aimed at situations where exclusive jurisdiction was granted to the Federal Government at the time of cession.

In the dissenting opinion of the State Supreme Court an observation is made that there seems to be a similarity

between the phrase "by any duly constituted taxing authority having jurisdiction to tax such compensation," which appears in the Public Salary Tax Act of April 12, 1939, c. 59, title I, sec. 4, 53 Stat. 575, 26 U.S.C.A. 22, 5 U.S.C.A. Sec. 84(a); and the phrase "having jurisdiction to levy such a tax" which appears in Public Act 819. It is therefore contended by the minority that the same meaning should be given to the phrase appearing in Act 819 as Congress intended should be given to the phrase appearing in the 1939 Act.

It seems quite clear that in the 1939 Act the word "jurisdiction" was not intended to refer to any *area* but rather to the *power* of the taxing authority to impose the type of a tax, which would include compensation of federal employees, such as wage taxes or income taxes.

The question of jurisdiction over a particular area or territory was not involved in the 1939 Act. The only purpose of the 1939 Act was to prevent the taxing of salaries of public employees prior to January 1, 1939.

It follows that since the word "jurisdiction" used in the 1939 Act was not intended to refer to *area* or *territory,* but rather to the *power* of the taxing authorities to impose the type of tax which would reach compensation of federal employees, that in 1940 Congress intended that the word "jurisdiction" should have the same meaning.

It seems surprising that if Congress had intended that Public Act 819 should only apply where the state or taxing authority already had jurisdiction over the territory that it could not have said so in plain language.

Congress by Public Act 819 was relinquishing taxing jurisdiction in sales, use, or income taxes to the State or taxing authority from whom it had received exclusive jurisdiction, and that accounts for the definition of federal area in section 6 of Act 819, and the cautionary provision contained in section 4 that Congress did not intend thereby to relinquish its entire exclusive jurisdiction; and the further provision that "such state or taxing authority shall have full jurisdiction and power to levy and collect such

tax in any federal area within such state to the same extent and with the same effect as though such area was not a federal area."

All of the aforesaid provisions would have been unnecessary if Congress had only intended to declare what the existing law was, namely, that where a state or taxing authority has reserved taxing jurisdiction it may continue to impose sales, use or income taxes in such areas.

4. Must a state accept a retrocession or relinquishment of jurisdiction from the Federal Government before it becomes valid?

The Supreme Court of Pennsylvania in the majority opinion states that an acceptance of recession of jurisdiction from the federal government will be presumed in the absence of a contrary intent.

Although the defendants do not concede that an acceptance of recession of jurisdiction from the federal government is necessary before it can become valid, nevertheless it is true that such acceptance will be presumed in the absence of a contrary intent.

In the case of FORT LEAVENWORTH RAILWAY CO. v. LOWE, 114 U.S. 525, 528, 29 L. Ed. 264, 265, this Court said:

> "As we have said, there is no evidence before us that any application was made by the United States for this legislation, but, as it conferred a benefit, the acceptance of the Act is to be presumed in the absence of any dissent on their part."

In the instant case when Congress by Public Act 819 relinquished its exclusive jurisdiction in regard to sales, use or income taxes and permitted a state or taxing authority to impose those taxes in federal areas with the same force and effect as if they were never any federal areas, it

was conferring a benefit upon Philadelphia or any other taxing authority which had granted exclusive jurisdiction to the federal government. Hence, the acceptance of such limited jurisdiction and power is presumed in the absence of any dissent on the part of the State of Pennsylvania or the City of Philadelphia.

Public Act 819 has been in force for almost three years, and the State of Pennsylvania has not placed on record any dissent or dissatisfaction with the Act.

Defendants, however, respectfully submit that it is not necessary for the State of Pennsylvania to either affirmatively or impliedly accept a recession or relinquishment of jurisdiction from the federal government.

No legal citation appears either in the majority or dissenting opinion filed by the State Supreme Court to support the proposition that a recession of jurisdiction by the federal government must be accepted by the state before it will be valid.

The case of YELLOWSTONE PARK TRANSP. CO. v. GALLATIN COUNTY, 31 Fed. 2d 644, cert. den. 280 U.S. 555 appearing in the majority opinion does not involve the question of a recession of jurisdiction from the federal government to a state. On the contrary, it involves the question of whether it is necessary for Congress to accept exclusive jurisdiction before it will become effective.

This will appear from the following language (p. 645):

> "Again, it is contended that there was no acceptance of the cession of exclusive jurisdiction by Congress. It will, of course, be conceded that such an acceptance is necessary, but the acceptance may be implied from other legislation."

The law seems to be that it is not necessary for a state to either formally or impliedly accept a recession or relinquishment of jurisdiction from the federal government. This was squarely decided in RENNER v. BENNETT, 21 Ohio St. Rep. 431 (1871).

In that case Congress ceded back certain jurisdiction to the State of Ohio. A resolution to accept this jurisdiction by the State of Ohio was defeated. Later the question arose whether votes from the ceded territory on behalf of the candidate for the office of Coroner should be counted. This necessarily involved the question of whether the retrocession of jurisdiction over the ceded territory by the federal government was effective without acceptance by the State of Ohio. The Supreme Court, in disposing of that question, said: (p. 445)

> "2. Is the consent of the State necessary in order to the retrocession or relinquishment of jurisdiction?
>
> We are quite clear in the opinion that it is not. The cession by the State was not a cession of absolute and perpetual jurisdiction. It was in effect, a mere suspension of jurisdiction. The State jurisdiction was not extinguished by the grant, but merely suspended. There was a reversion left in the State. This is so, because the purposes for which the grant was made are temporary. The right to exercise the jurisdiction granted was to be exclusive while it continued, but it was to be a mere temporary right. It could not, at the farthest, out-last the lives of the 'disabled volunteers in the late rebellion,' and it was liable at any time to be terminated by an abandonment, or diversion of the property from the purposes of the grant. The thing really granted *was jurisdiction during the pleasure of congress, but not to be extended beyond the lives of the soldiers.* When congress abandons the jurisdiction, or when the disabled soldiers all die, the thing granted, which was at first indeterminate, has been terminated, and fully enjoyed, and expires by its own limitation. The fact that the legislature of Ohio refused to accept the jurisdiction so receded, or relinquished, has no significance. The very ground of that refusal may have been that there was no necessity for such acceptance."

This case was cited by the United States Supreme Court in ARLINGTON HOTEL CO. v. FANT, 278 U.S. 445, 455; 73 L. Ed. 447, 452; by Circuit Judge Stone (now Chief Justice) in the case of WILLIAMS v. ARLINGTON HOTEL CO. 22 Fed. 2d 669, 671; by Circuit Judge Taft in In re THOMAS, 82 Fed. Rep. 304, 308, and in YELLOW CAB TRANSIT CO. v. JOHNSON, 48 F. Suppl. 594, 600 (1942) W. D. Oklahoma, where the Court said:

> "The case of Renner v. Bennett (21 Ohio St. Rep. 431), is authority for the rule that acceptance of the act of recession is unnecessary."

It was pointed out by the Supreme Court of Ohio that it is well settled that Congress may divest itself of the acquired jurisdiction and restore it to the state, by abandonment of its use, or by parting with the ownership.

The Court further reasoned that jurisdiction so acquired by the federal government is not an *original* or *inherent* power of Congress. It is a *secondary* and *acquired* power and Congress can exist without such power. The original and inherent power of Congress was the *power to acquire* the jurisdiction, and not the *jurisdiction* itself. The constitution divested the state of no jurisdiction, and, thereover, vested none in Congress. The transfer of jurisdiction to Congress is a matter which belongs exclusively to the state and Congress. The constitution had no agency in the transfer. It found the jurisdiction in the State, and left it there. It merely gives to Congress the power to acquire and use the thing granted, and prescribes a *form* or *manner* in which the grant may be made.

The Supreme Court of the State of Ohio further observed that the ceded territory never ceased to be a part of the state geographically, although the state jurisdiction over it has been temporarily suspended. This last thought finds support in the language used by this Court in the case of CHICAGO, ROCK ISLAND AND PACIFIC RY. CO. v. McGLINN, 114 U.S. 542, 546; 29 L. Ed. 270, 271, where it was said:

> "It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another the municipal law of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign."

In the case of WILLIAMS v. ARLINGTON HOTEL CO., 22 F. 2d 669, 671, Judge Stone (now Chief Justice) said:

> "The McGlinn case is direct authority for the contention made by plaintiff in error that the laws of the state in existence at the time of the cession continue upon the reservation where not inconsistent with the laws of the United States or where not abrogated by Congress after the cession."

In the case of FORT LEAVENWORTH RAILWAY CO. v. LOWE, 114 U.S. 525, 542, 29 L. Ed. 264, 270, this Court said:

> "It is necessarily temporary, to be exercised as long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used the jurisdiction reverts to the state."

In the instant case the cession of exclusive jurisdiction over League Island was made on this condition:

> "Providing, however, that the cession * * * made shall continue in force as long as the * * * territory shall be used by the Government of the United States for the purpose of a navy yard, and *no longer*." (Italics supplied.)

It may be inquired what would happen if the Government ceased to use League Island for the purposes of a navy yard. Under the act of cession the federal Government would cease to have exclusive jurisdiction thereof.

Suppose Pennsylvania never formally accepted jurisdiction over League Island, or, as was done in the Ohio case, suppose Pennsylvania refuses to accept jurisdiction over League Island? Would jurisdiction over League Island then be suspended like Mohammed's coffin so that neither the federal government nor the State of Pennsylvania would have any jurisdiction thereof? Such a situation is unthinkable. And yet, if a recession or surrender of jurisdiction by the federal government must be formally accepted by the State, then such an absurd result would follow.

If jurisdiction over League Island would immediately vest in the State of Pennsylvania when the Government ceased to use League Island as a navy yard, regardless of whether Pennsylvania would formally accept such jurisdiction, the same result would follow when Congress voluntarily surrenders or yields a portion of its original jurisdiction to the State.

In the dissenting opinion in the instant case it is pointed out that since Congress had to formally accept exclusive jurisdiction, it follows that the state must formally accept a recession of said jurisdiction. The writer of the dissenting opinion, however, overlooks the fact that the reason for the necessity of formal acceptance by Congress was because in the act of cession it was stated that such exclusive jurisdiction shall only become effective after title to the land shall be accepted by Congress; but nowhere is it stated that a recession of such jurisdiction shall not become effective until formally accepted by the State of Pennsylvania.

Since the jurisdiction that was granted to the federal government over League Island was necessarily temporary in the sense that it terminated when League Island was no longer used as a navy yard, the thought expressed by the

Supreme Court of Ohio that the state jurisdiction over such ceded territory has been temporarily suspended applies; and if such jurisdiction has only been temporarily suspended then no logical reason appears why Congress cannot return a portion of said jurisdiction to the ceding state without the necessity of the formal acceptance of the same by the state.

Plaintiff further contends that the Ordinance of December 13, 1939 cannot apply to a situation created after December 31, 1940 by Public Act 819, because when the City Ordinance was passed the City had no power to impose income taxes against non-residents earning compensation at League Island.

In advancing such a contention the plaintiff overlooks the language of the Supreme Court of Pennsylvania in the case of BLAUNER'S INC. v. PHILADELPHIA, 330 Pa. 342, 348, 198 A. 889:

> "We think the same power is vested in the City of Philadelphia by the Sterling Act, supra, which authorizes it 'to levy, assess, and collect, or provide for the levying, assessment and collection' of taxes * * *. Under such a broad legislative grant the City's power of collection is limited only by constitutional restriction."

In other words, the State of Pennsylvania delegated to the City of Philadelphia under the Sterling Act, August 5, 1932, P.L. 45, 53 P.S. 4613, in such fields of taxation where the State has not entered, the same broad powers possessed by the State. Consequently, if in 1939 the State had an income tax which did not at that time apply to non-resident federal employees earning compensation at League Island, after January 1, 1941, the State would not have to adopt a special act agreeing that it would accept the benefits of Public Act 819 before it would have the right to include within such income tax the compensation earned by a non-resident federal employee at League Island.

This was squarely decided by the Superior Court of Pennsylvania in the case of PHILADELPHIA v. SCHALLER, 148 Penna. Super. Ct. 276, 282, 25 A. 2d 406, 410, where the Court said:

> "When the disability of the state to tax federal incomes was removed, there was no need for a re-enactment of the legislation to reach incomes formerly exempt; the powers originally granted, broad enough to include all income regardless of the source, were sufficient for the purpose."

Since the Supreme Court of Pennsylvania refused an allocatur and the Supreme Court of the United States denied a writ of certiorari (87 L. Ed. 38, 63 Sup. Ct. 43) it may be assumed that the language quoted hereinabove from the opinion of the Superior Court was approved by the State Supreme Court and the United States Supreme Court.

If this be true as regards the State of Pennsylvania, then it follows that it should be applicable to the powers of the City of Philadelphia granted to it by the State to impose income taxes. Hence, since the City's power of collection of income taxes is limited only by constitutional restrictions, and since the State legislature transferred all the taxing powers possessed by the State, then there would be no occasion for the City of Philadelphia to obtain consent from the State of Pennsylvania to include within its Income Tax Ordinance of 1939 the compensation earned by non-resident federal employees at League Island.

In other words, Philadelphia stepped into the shoes of the State of Pennsylvania as regards the right and power to impose income taxes; and since Pennsylvania would not be compelled to adopt a new law imposing income taxes on non-residents working in the navy yard after January 1, 1941, if prior to that time it had a general income tax, it follows that the City of Philadelphia did not have to adopt a new ordinance.

Petitioner further argues that this compensation earned at the navy yard cannot be taxed because he received none of the benefits that the City affords to others who either reside or work in Philadelphia.

The Supreme Court of Pennsylvania effectively answered that contention on pages 294 and 295 of 31 A. 2d. There the Supreme Court points out all the benefits that the plaintiff is not only entitled to receive from the City of Philadelphia but actually receives.

In SHAFFER v. HOWARD, 250 Fed. 873, Circuit Judge Stone (now Chief Justice of the United States) discusses extensively the right of a state to tax the *privilege of receiving income* within its confines, whether the person receiving such income does or does not reside therein.

In SHAFFER v. CARTER, 252 U.S. 37, 64 L. Ed. 445, 457, this Court said:

> "* * * it does not follow that the business of non-residents may not be required to make a ratable contribution in taxes for the support of the Government. On the contrary, the very fact that a citizen of one State has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such non-resident, although not personally, yet to the extent of his property held or his occupation or business carried on therein to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter State. Sec. 2 of art. 4 of the Constitution entitles him to the privileges and immunities of a citizen, but no more; not to an entire immunity from taxation, *nor to any preferential treatment as compared with resident citizens.* It protects him against discriminatory taxation, but gives him no right to be favored by discrimination or exemption. See Ward v. Maryland, 12 Wall. 418, 430, 20 L. ed. 449, 452." (Italics supplied.)

In RAINER NATIONAL PARK COMPANY v. MARTIN, 18 F. Suppl. 481, 488 aff. 302 U.S. 661, 82 L. ed. 511, it was said:

> "Further it is qualified to do business in the state, and as such could take advantage of the protection afforded. Simply because it does not take advantage of such protection is no reason for declaring a tax void, when the protection is available."

The defendants therefore respectfully suggest to this Honorable Court that there appear no substantial reasons why the majority opinion of the Supreme Court of Pennsylvania should be reviewed by this Court.

WHEREFORE, defendants pray your Honorable Court to dismiss the petition for writ of certiorari.

CITY OF PHILADELPHIA,
By WALTER CAMENISCH,
Deputy Receiver of Taxes in charge of Philadelphia Income Tax.

ROBERT MCCAY GREEN,
City Solicitor,
ABRAHAM L. SHAPIRO,
ABRAHAM WERNICK,
Assistant City Solicitors,
Attorneys for Defendants.

END OF A CASE